92-1346

No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,

Petitioner,

VS.

IVRON BUTLER, FRANK A. LEDFERD,
DAVID CORDER, HERSHEL MARSH,
DOYLE KIRKMAN, JAY M. FRENCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ERWIN O. SWITZER, III
(Counsel of Record)
Special Assistant Attorney General

JEREMIAH W. NIXON
Attorney General
State of Missouri
211 North Broadway
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

Attorneys for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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QUESTIONS PRESENTED

1. When plaintiffs seek actual and punitive damages and injunctive and declaratory relief against eleven defendants in six counts under 42 U.S.C. §1983, and the verdict is only for nominal damages against one defendant on one count, is the award of $95,000 in attorneys' fees to plaintiffs' counsel "reasonable" in light of *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992)?

2. May attorneys' fees on appeal be awarded when plaintiffs' primary success on appeal was preserving a $95,000 district court attorneys' fees award based on a nominal damages verdict?

STATEMENT PURSUANT TO RULE 14.1(b)

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are found in the caption of this Petition for Writ of Certiorari. The caption includes two persons who originally were plaintiffs in the district court but whose cases were voluntarily dismissed on the first day of trial: Ivron Butler and Doyle Kirkman. Also on the first day of trial all defendants but one were voluntarily dismissed with prejudice. The former defendants are:

Dick Moore

George Lombardi

Myrna Trickey

Daniel Henry

Phil Banks

Bruce Scott

Tim Sellars

Allan Luebbers

Rick Jones

Tom Gibson

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 14.1(b)	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes and Constitutional Provisions Involved	3
Statement of the Case	3
Reasons Why the Writ Should Be Granted	6
I. THE DECISION OF THE COURT OF APPEALS UPHOLDING A LARGE ATTORNEYS' FEES AWARD BASED ON A NOMINAL DAMAGES VERDICT IS CONTRARY TO THIS COURT'S RECENT DECISION IN *FARRAR v. HOBBY*.	6
II. THE AWARD OF ATTORNEYS' FEES ON APPEAL IS ALSO CONTRARY TO *FARRAR v. HOBBY*	9
III. THIS COURT SHOULD SUMMARILY REVERSE THE JUDGMENT OF THE COURT OF APPEALS OR, ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF *FARRAR v. HOBBY*.	9
Conclusion	11

Appendix

Appendix A

Judgment of the United States Court of Appeals for the Eighth Circuit, dated November 11, 1992, as amended A-1

Appendix B

Order of Consolidation of appeals by the United States Court of Appeals for the Eighth Circuit, dated December 10, 1990 ..... A-49

Appendix C

Order Granting Petition for Rehearing by the United States Court of Appeals for the Eighth Circuit, dated April 1, 1992 ..... A-50

Appendix D

Order of the United States District Court for the Eastern District of Missouri awarding attorneys' fees to plaintiffs, dated September 17, 1990 ..... A-51

Appendix E

Memorandum of the United States District Court for the Eastern District of Missouri in connection with the award of attorneys' fees to plaintiffs, dated September 19, 1990 ..... A-52

Appendix F

Order by the United States Court of Appeals for the Eighth Circuit awarding plaintiffs attorneys' fees on appeal, dated February 3, 1993 ..... A-56

TABLE OF AUTHORITIES

Page(s)

Cases:

Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992) 1

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966) 8

Farrar v. Hobby, 506 U.S. ___, 113 S.Ct. 566 (1992) ...*passim*

Hewitt v. Helms, 482 U.S. 755 (1987) 7

James B. Beam Distilling Co. v. Georgia, ____ U.S. ____, 111 S.Ct. 2439 (1991) 8

Kolodzieczak v. Friend, 61 LW 3498, No. 92-292 (U.S. Jan. 19, 1993), vacating and remanding 965 F.2d 682 (9th Cir. 1992) 10

Nichols v. Romberg, 61 LW 3498, No. 92-402 (U.S. Jan. 19, 1993),vacating and remanding 953 F.2d 1152 (9th Cir. 1992) 10

Riverside v. Rivera, 477 U.S. 561 (1986) 8

Other Authorities:

28 U.S.C. §1254 3

28 U.S.C. §1291 4

28 U.S.C. §1331 3

28 U.S.C. §1343 3

42 U.S.C. §1983 3,8

42 U.S.C. §1988(b) 4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Denis Dowd, defendant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed November 11, 1992, and the Order of the United States Court of Appeals for the Eighth Circuit awarding attorneys' fees on appeal, filed February 3, 1993.

OPINIONS BELOW

The judgment that is the subject of this petition is the attorneys' fees portion of the *en banc* opinion of the United States Court of Appeals for the Eighth Circuit entered on November 11, 1992. *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992). Amend-

ments to the dissenting opinion in ways not material to this petition were made on November 17, 1992 and January 7, 1993. A copy of the *en banc* opinion, as amended, is reproduced in Appendix A. The opinion covers three appeals which were consolidated by order of the United States Court of Appeals for the Eighth Circuit dated December 10, 1990. The consolidation order is reproduced in Appendix B. This petition is directed only to one of those consolidated appeals—No. 90-2782EM—which dealt with the award of attorneys' fees to plaintiffs/respondents by the district court.

A petition for rehearing en banc was granted by Order of the United States Court of Appeals for the Eighth Circuit on April 1, 1992, which is reproduced in Appendix C. This order vacated a panel opinion that had been entered February 6, 1992. The vacated order is not published, but can be found in WESTLAW, 1992 WL 18260. The appeal to the Eighth Circuit on attorneys' fees was from an Order of the United States District Court for the Eastern District of Missouri entered September 17, 1990 (Cause No. 89-0276-C(6)), which is reproduced in Appendix D. The district court issued a Memorandum in connection with that order on September 19, 1990, which is reproduced in Appendix E.

Petitioner also seeks review of the Order entered by the United States Court of Appeals for the Eighth Circuit on February 3, 1993, awarding plaintiffs $12,000 in attorneys' fees for work on appeal, together with costs in the amount of $47.25. This order is reproduced in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the award of attorneys' fees in the district court was entered on November 11, 1992. The Order of the United States Court of Appeals for the Eighth Circuit awarding attorneys' fees on appeal was entered February 3, 1993. This petition was filed and served in accordance with the

rules of this Court within 90 days of November 11, 1992 and February 3, 1993. Jurisdiction of this Court is founded upon 28 U.S.C. §1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Plaintiffs/respondents are four of six prisoners who sued various corrections officials and employees, alleging that defendants failed to adequately protect them from being sexually assaulted by other inmates. Plaintiffs brought their claims under 42 U.S.C. §1983, and asserted jurisdiction in the district court pursuant to 28 U.S.C. §§1331 and 1343. During the course of the jury trial the case was narrowed to four plaintiffs against one defendant (the prison Superintendent) on one count. The evidence was undisputed that protective or administrative housing was made available to plaintiffs upon request, and they admitted they were never raped in such housing.

Plaintiffs sought wide-ranging relief, including actual and punitive damages and extensive injunctive relief which would have altered many prison policies or created new policies and programs. The jury refused to awarded actual or punitive damages. Pursuant to a jury instruction requested by plaintiffs, only nominal damages of $1 per plaintiff were awarded. The verdict was general one, so there were no express findings as to the nature of the alleged sexual assault found (physical or

verbal), and there were no findings that plaintiffs were seriously injured, that the Superintendent was responsible for many of the injuries plaintiffs alleged they sustained, or that the policies of the institution were improper.

After the verdict, plaintiffs filed motions seeking injunctive and declaratory relief, and requested a new trial limited to damages. The post-trial motions were denied.

Having avoided a defense verdict by the skin of their teeth and having lost on efforts to obtain equitable relief, plaintiffs then claimed that under 42 U.S.C. §1988 they were entitled to attorneys' fees for their "success." The district court calculated a lodestar of $94,680. The district court made no downward adjustment in the lodestar in light of the lack of success (Appendix D, at A-51 and Appendix E, at A-55).

Plaintiffs appealed the denial of their post-trial motions to the Eighth Circuit pursuant to 28 U.S.C. §1291. Petitioner/defendant appealed from the judgment and the attorneys' fees award, with the major significance of the appeal from the nominal damages judgment being the fact that it formed the basis for the large attorneys' fees award.

The case was first heard by a panel of the United States Court of Appeals for the Eighth Circuit. In a two-to-one decision, the panel held that plaintiffs were entitled to a new trial limited solely to the issue of damages and were entitled to a further hearing on injunctive relief. The panel remanded the attorneys' fees issue to the district court to make either an upward or downward adjustment after further proceedings on damages and injunctive relief.

Petitioner's suggestion for rehearing en banc was granted, which vacated the panel opinion (Appendix C, at A-50). After argument, the court en banc affirmed the judgment of the district court in all respects, including attorneys' fees (Appendix A).

One month later this Court issued its decision on attorneys' fees in cases in which only nominal damages are awarded in *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992).

Petitioner consistently opposed the attorneys' fees award. Petitioner argued for a at least a 90% reduction in the fee awarded by the district court to "no more than" $10,000. Brief of Appellee-Cross-Appellant, at 30. Petitioner's brief did not suggest that there was a floor on the amount of attorneys' fees which plaintiffs could be awarded.

Plaintiffs also sought attorneys' fees in the amount of $32,000 for their work on appeal. The Eighth Circuit awarded plaintiffs $12,000 in attorneys' fees, stating that *Farrar* "is not directly applicable to this case, nor to the application for fees on appeal." The Eighth Circuit went on to note that "had the *Farrar* decision been issued prior to the filing of the en banc opinion in this case, it may well have altered our view as to the allowability of fees at the trial" (Appendix F, at A-56).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS UPHOLDING A LARGE ATTORNEYS' FEES AWARD BASED ON A NOMINAL DAMAGES VERDICT IS CONTRARY TO THIS COURT'S RECENT DECISION IN *FARRAR v. HOBBY*.

This Court should vacate the judgment below, as it has done with other attorneys' fees cases involving nominal damages since *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992). Pursuant to *Farrar*, plaintiffs/respondents are entitled to no attorneys' fees for their unsuccessful effort in the district court.

This Court stated in *Farrar*: "*When a plaintiff recovers only nominal damages because of a failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.*" 113 S.Ct. at 575 (citations omitted). As Justice O'Connor stated: "*When the plaintiff's success is purely technical or de minimis, no fees can be awarded.*" *Id.* at 576 (O'Connor, J., concurring). This case falls squarely within the directives and facts of *Farrar*, so the only reasonable fee for these plaintiffs is $0.

In *Farrar* the Court held that even though a nominal damages award may be sufficient to make a plaintiff a "prevailing party," that does *not* mean that the plaintiff is entitled to attorneys' fees. In *Farrar* this Court found that the plaintiff's lack of success was so obvious that the lower courts *did not have the discretion* to award anything other than $0 in fees, and this Court did not remand the case.[1] The statement made by this Court in *Farrar* is fully applicable here: "This litigation accomplished little

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[1] The Fifth Circuit denied fees on the basis that nominal damages did not make the plaintiff a prevailing party. This Court disagreed, but affirmed the result because the lower court had no discretion to award fees to a party who "prevailed" to such a limited extent.

beyond giving petitioners `the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." 113 S.Ct. at 574, *citing Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

In *Farrar* the plaintiff alleged that state officials deprived him of property and liberty without due process in closing a school for disturbed teens. The jury found that there had been an unconstitutional conspiracy, but concluded that the plaintiff was not damaged as a result. The plaintiff received only nominal damages. This Court denied attorneys' fees.

Here the facts are even more egregious. Respondents were part of a group of six original plaintiffs who sued eleven defendants on six counts alleging that defendants were responsible for plaintiffs being sexually assaulted by other inmates. They sought $300,000 in actual damages, $5,000,000 in punitive damages, declaratory relief, and injunctive relief.[2] The jury here, as in the *Farrar* case, found that plaintiffs were not damaged, and thus plaintiffs had "recover[ed] only nominal damages because of a failure to prove an essential element of [their] claim for monetary relief," meaning no fees should be awarded under *Farrar*. 113 S.Ct. at 575. Plaintiffs technically "prevailed" on four of the 396 potential verdicts.

Plaintiffs' lawyer admits that the verdict was indeed purely technical and *de minimis*. *He* characterized it as a "take-nothing verdict," the same type of verdict rendered in *Farrar*. 113 S.Ct. at 570; see Plaintiffs' Memorandum in Support of Motion for

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[2] The injunctive relief sought included a new classification system to segregate those persons meeting a supposed predator profile (who plaintiffs described as large, African-American repeat offenders) from persons like the plaintiffs (white, first-time offenders). They asked to be transferred to a different prison and sought a new training program for employees, they wanted to star in a video to be shown to new inmates, they demanded that more protective custody cells "be available," and they sought many other new specific procedures.

New Trial on Damages, filed in district court 4/12/90. It was plaintiffs who appealed first, and, except for the fees award, they certainly considered the case a "loss." Plaintiffs' lawyer argues that the verdict implies that an important constitutional right was denied, but the *Farrar* Court stated that such a general implication was *not* enough to warrant an attorneys' fees award. 113 S.Ct. at 574. The general verdict here implied only that plaintiffs' rights had been violated in some unspecified way. As the concurring opinion in the Eighth Circuit points out, one cannot even tell if the jury concluded that plaintiffs were raped (Appendix A-31 to 32). The verdict does not indicate whether the jury believed there was a defective policy, a failure to follow policy, a failure to supervise, or some other situation that led to a plaintiffs' verdict. Nor is there any evidence that changes in policy occurring before, during, or after the litigation were in any way prompted by the litigation. In fact, plaintiffs resisted efforts at policy changes by filing a grievance when a change that could decrease the risk of assault was made. See en banc opinion, Appendix A at A-24. In other words, this verdict does not have policy implications beyond this case.

Attorneys' fees should not be the centerpiece of §1983 litigation. Fees awards are not intended to produce "windfalls to attorneys." *Farrar*, 113 S.Ct. at 575, *citing Riverside v. Rivera*, 477 U.S. 561, 580 (1986). This Court should not allow plaintiffs any attorneys' fees for this case.[3]

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[3] If plaintiffs/respondents argue that there has been a waiver of the *Farrar* argument, they would be wrong. This Court has held that there must be full and immediate application of Supreme Court rulings to all pending cases. *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991). Furthermore, the failure to raise an argument prior to the announcement of a decision to support it is not a waiver. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1966). Also, the *Farrar* opinion did not find a waiver of the "prevailing party but no fees" argument.

(Footnote 3 continued on next page)

II. THE AWARD OF ATTORNEYS' FEES ON APPEAL IS ALSO CONTRARY TO *FARRAR v. HOBBY*

If there was error in sustaining the attorneys' fees award, then plaintiffs should not be considered prevailing parties for purposes of the appeal. If district court fees are denied (or even substantially reduced), plaintiffs will have lost on every issue on appeal except the sustaining of the verdict of $1 per plaintiff. As explained above, "success" on that issue is *de minimis* under *Farrar*. This is especially true here, where the significance of the nominal damages award came from the fact that it was used as a hook for nearly $100,000 in fees.

Furthermore, contrary to the statement in the Order of the Eighth Circuit, there is no reason why *Farrar* would not or should not apply to appellate fees awards.

III. THIS COURT SHOULD SUMMARILY REVERSE THE JUDGMENT OF THE COURT OF APPEALS OR, ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION IN LIGHT OF *FARRAR v. HOBBY*.

A summary reversal or a remand with specific instructions to apply *Farrar* to the district court and appellate fees awards is

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(Footnote 3 continued)

Furthermore, even though "waiver" is not an issue under the above authorities, petitioner/defendant in fact always argued for a drastic reduction in the fees awarded by the district court, an argument buttressed by *Farrar*. For instance, petitioner asserted that the district court attorneys' fees award should be reduced to "no more than $10,000." Brief of Appellee-Cross-Appellant, at 30. See also Reply Brief of Appellee-Cross-Appellant, at 17 (requesting substantial reduction in fees award). Petitioner did not assert that plaintiffs were entitled to some fees. The only thing that petitioner did not do was explicitly state that the requested reduction could be down to $0. Petitioner conceded that plaintiffs were prevailing parties, a fact alluded to in footnote 23 of the en banc opinion (Appendix A-28). *Farrar* confirmed that petitioner's concession on this point was correct.

necessary in this case. The Eighth Circuit stated in its Order of February 3, 1993 that it did not consider *Farrar* to be "directly applicable to this case, nor to the application for fees on appeal" (Appendix F, at A-56). It is important that this Court make clear that *Farrar* does apply to a case like this one, and that it does apply to appellate fees awards. The facts of this case are so overwhelming and so clearly within the scope of *Farrar* that summary reversals on both the district court and appellate fees issues are appropriate. It is noteworthy that the only suggestion in *Farrar* as to the type of case where nominal damages may support an attorneys' fees award is a procedural due process case. This is not a procedural due process case.

This Court has already vacated judgments awarding substantial attorneys' fees based on nominal damages awards since the *Farrar* decision was rendered. *Nichols v. Romberg*, 61 LW 3498, No. 92-402 (U.S. Jan. 19, 1993), *vacating and remanding* 953 F.2d 1152 (9th Cir. 1992)(nominal damages; lower court reduced lodestar by 50%); *Kolodzieczak v. Friend*, 61 LW 3498, No. 92-292 (U.S. Jan. 19, 1993), *vacating and remanding* 965 F.2d 682 (9th Cir. 1992).

At a minimum, *Farrar* stands for the proposition that there should be a dramatic reduction in the attorneys' fees award, and an award of the district court lodestar figure (reasonable rate times hours) cannot be sustained. Similarly, the adjustment in the district court judgment necessarily requires an adjustment in the appellate court fees, and that adjustment should take *Farrar* into account.[4]

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[4] Any reversal or vacation of the November 11, 1992 judgment should be limited to that part of the judgment of the Eighth Circuit which affirmed the attorneys' fees order of the district court dated September 17, 1990 (Eighth Circuit Appeal No. 2782EM). The underlying judgment is not the subject of this petition. The appeals from the underlying judgment were separate from the attorneys' fees appeal, and were merely consolidated by the appellate court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted. The judgment of the United States Court of Appeals for the Eighth Circuit as it relates to plaintiffs' claim for attorneys' fees (Eighth Circuit Appeal No. 90-2782EM) should be reversed and remanded with directions to enter judgment for petitioner on respondents' claim for attorneys' fees in the district court. The February 3, 1993 Order of the Eighth Circuit awarding attorneys' fees on appeal should also be reversed and remanded with directions to deny all fees to respondents for work on appeal. Alternatively, (1) the attorneys' fees portion of the November 11, 1992 judgment and (2) the Order of February 3, 1993 awarding attorneys' fees on appeal should be vacated and remanded to the United States Court of Appeals for the Eighth Circuit, all for further consideration in light of *Farrar v. Hobby*, 506 U.S. ____, 113 S.Ct. 566 (1992).

Respectfully submitted,

Erwin O. Switzer, III
(Counsel of Record)
Special Assistant Attorney General

Jeremiah W. Nixon,
Attorney General
State of Missouri
211 North Broadway
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

Attorneys for Petitioner

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